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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JORGE ESPINOZA SILVA, Defendant and Appellant.	B206121 (Los Angeles County Super. Ct. No. TA091670)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary R. Hahn, Judge. Affirmed.

Irma Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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Jorge Espinoza Silva appeals from his convictions for assault with a deadly weapon on eight peace officers. He challenges the sufficiency of the evidence to support his conviction as to two of the officers. Appellant also argues he was deprived of the effective assistance of trial counsel because his attorney failed to object to various incidents of misconduct committed by the prosecutor in closing argument. The assault charges are supported by substantial evidence. We conclude that the prosecutor did not commit misconduct, and therefore there was no basis for defense objection and as a result, no ineffective assistance of counsel.

FACTUAL AND PROCEDURAL SUMMARY

Friday afternoon, July 13, 2007, Los Angeles Sheriff's Deputy Casey Woodruff was involved in a traffic stop at the intersection of El Camino Avenue and San Luis Street in Paramount. He was in uniform and had three persons detained in his marked patrol car. Appellant lived at the northeast corner of the intersection, but was not involved in the traffic stop. During the stop, Deputy Woodruff saw appellant step onto his porch, look at him, walk inside, and then heard loud music coming from appellant's house. Appellant came back out, shirtless this time, flexing his arms and beating his chest. Deputy Woodruff thought appellant's behavior unusual and radioed for backup. Deputies Berg, Barragan and Niebla responded. A short time later, Deputies Esqueda and Garcia arrived on the scene. All the officers were in uniform. Appellant's evidentiary challenge is to the charges involving assault on Deputies Berg and Niebla only.

While Deputy Barragan helped Deputy Woodruff with the traffic stop at the southeast corner of the intersection, Woodruff heard sporadic, unidentifiable "'pinging'" noises which were sometimes loud and other times faint. We refer to this as the first volley. Woodruff was by his patrol car on the southeast corner of the intersection, about 30 feet from appellant's house. Deputies Esqueda, Barragan, Berg and Niebla were near Woodruff's patrol car. Deputy Woodruff said that Deputy Niebla was 25 feet from appellant's house. Deputies Esqueda, Berg, and Barragan began to investigate the source

of the noise. Deputy Woodruff finished his traffic stop and turned his attention to the pinging sound. He saw two-to-three-inch nails on the ground near his patrol car. As the deputies walked around, they saw "a lot more."

In what we term the second volley, Deputy Barragan heard metal hitting metal and saw a nail bounce off a stop sign next to him and hit the ground. Another nail richocheted off the asphalt next to him. The other deputies at the scene at that point, including Berg and Niebla, were in close proximity to Deputy Barragan when the nails hit the stop sign and asphalt next to him.

While standing at the southwest corner of the intersection, Deputy Esqueda heard "whizzing" and "metal striking metal" sounds, but was unable to determine how close they were to him. The deputies found additional nails around the patrol car and in the intersection.

Deputy Esqueda walked over to Deputy Niebla's car, which was parked facing north, just east of appellant's house. The rear fender of the patrol car, which is one-quarter inch plastic, had a nail sticking through it. The windows were down on Deputy Niebla's car, and there were nails inside the vehicle. According to Deputy Woodruff, appellant would open his door, the pinging noise would be heard, then appellant's door would shut immediately. All the nails came from the direction of appellant's home.

When the deputies identified appellant's house as the source of the nails, they asked for additional backup. They set up a containment area around appellant's house and began evacuating neighboring homes. The nails were coming at the officers at high velocity, and Deputy Woodruff believed they could puncture a vest and that someone could be killed. During the evacuation, another volley of nails was fired in the direction of the officers. Deputy Woodruff said he could hear them, see them in the air, then see them on the ground. He was sitting next to a brick wall and saw nails hit the wall. He saw an arm protrude from appellant's front door holding a metal object, and heard firing. Deputy Woodruff saw the arm point at Deputies Garcia, Barragan, and Sergeants Castillanos and Marquez who had responded to the scene.

At this point, the officers were ordering appellant to stop firing, come out, and lay down. Appellant would repeatedly go inside his house, come out, fire, and return to the house. He was gesturing and screaming curses at the officers. Deputy Woodruff walked towards Deputy Niebla's patrol car. He saw appellant walk through his front yard and try to get inside the patrol car. Deputy Garcia shot appellant with rubber rounds and appellant ran back inside his house.

When appellant reemerged from his house making crude gestures at the officers, Deputy Niebla shot pepper balls around the front door. Appellant went inside. A few minutes later more nails were fired. At one point, appellant came out and dribbled a basketball.

Deputy Woodruff testified that most of the nails were fired to the south, but at times they would go from southwest to southeast in a fanning pattern. The confrontation continued for hours, with additional volleys of nails fired by appellant, until a K-9 unit took him into custody after tear gas was used. A search of appellant's residence after the incident ended revealed an interior door studded with multiple nails. Before darkness impeded recovery of additional evidence, 107 nails were found in a 180 degree spread from appellant's house. Some nails were found 100 feet from appellant's house. The parties stipulated to the admission of four minutes of a videotape of the incident taken by a deputy sheriff. It depicted appellant standing in the doorway of his home.

In his defense, appellant testified that he had argued with his wife the night before the incident and that he had been drinking. He admitted firing a nail gun but claimed he was shooting at a nearby street sign. Appellant admitted that he saw the officers in the intersection in front of his residence before he started firing the nail gun. He denied pointing the nail gun at any of the officers. He acknowledged that the nail gun could do "violent harm" to a person and "can possibility kill somebody." Appellant admitted prior "run-ins" with the police. He admitted prior felony convictions for theft and robbery.

Appellant was convicted of eight counts of assault on a peace officer with a deadly weapon in violation of Penal Code section 245, subdivision (c). He was sentenced to an aggregate term of 24 years, 4 months in state prison. This timely appeal followed.

DISCUSSION

I

Appellant argues the evidence was insufficient to support his convictions for assault on Deputies Berg and Niebla. We do not agree.

During the first volley, all the officers, including Berg and Niebla, were gathered around Deputy Woodruff's patrol car. Deputy Barragan testified that in the second volley, nails hit a stop sign and richocheted off the asphalt next to him. At that point, Deputies Woodruff, Berg, Niebla and Esqueda "were in close proximity" to him. Deputy Esqueda testified that he heard a whizzing sound and the sound of metal striking metal when he arrived at the scene. Deputies Woodruff, Niebla, Berg and Barragan were "around" him.

Although there was more specific evidence about the whereabouts of other officers, this was sufficient evidence to support appellant's conviction of assault with a deadly weapon on Deputies Berg and Niebla. In each of these instances, Deputies Berg and Niebla were in the group of officers at whom nails were directed. Penal Code section 245, subdivision (c) provides: "Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer . . . , and who knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for three, four, or five years." "Assault" is defined in Penal Code section 240: An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

"[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*People v. Williams* (2001) 26 Cal.4th 779, 788.) Here, evidence that appellant

fired his nail gun more than once at a group of officers which included Deputies Berg and Niebla satisfies this standard.

II

Appellant argues that his trial attorney was prejudicially ineffective because no objection was raised to multiple instances of prosecutorial misconduct. Each instance of asserted misconduct arose during closing argument.

"Under *Strickland* [*v. Washington* (1984) 466 U.S. 668, 687-688], a defendant asserting ineffective assistance of counsel must demonstrate '(1) that counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Richardson v. Superior Court* (2008) 43 Cal.4th 959, 1050.) "'"[T]rial counsel's tactical decisions are accorded substantial deference [citations], [and] . . . [a] reviewing court will not second-guess trial counsel's reasonable tactical decisions."' [Citation.]" (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 97.)

When a defendant bases a claim of ineffective assistance of counsel on failure to object to prosecutorial misconduct, if the reviewing court determines the prosecutor's arguments were appropriate, there would be no reason for an objection, and defense counsel's failure to make an objection is not unreasonable. (*People v. Salcido* (2008) 44 Cal.4th 93, 171-172 (*Salcido*).) Under these circumstances, defense counsel's failure to object does not result in a violation of defendant's constitutional right to the effective assistance of counsel. (*Ibid*.)

Applying the principles announced in *Salcido*, *supra*, 44 Cal.4th 93, we first determine whether there is merit to appellant's claims of prosecutorial misconduct in order to assess his ineffective assistance claims.

A. Denigration of Appellant

Appellant first claims the prosecutor improperly denigrated him by saying appellant "doesn't want you to see the real Jorge Silva." He also cites the prosecutor's

argument that appellant had changed "'his appearance to make himself look like someone who he really wasn't. To grow out his hair, make him look more conservative looking, so that he could appeal to you.'" Appellant also cites the prosecutor's statement that appellant had "'six months to prepare for what [he] will do and say at trial.'"

These comments, appellant contends, improperly denigrated him before the jury and implied that he lied during his testimony. He reasons that this promoted a verdict on the theory that appellant was guilty because of bad character, citing *United States v. Mendoza* (5th Cir. 2008) 522 F.3d 482. In addition, appellant argues the statements improperly advised the jury of the prosecutor's personal opinion of his guilt.

The context of the statements is important to our analysis. The prosecutor argued that Silva's trial appearance (a nice shirt and a full head of hair, with a mustache) was a presentation for the jury. The prosecutor asked, rhetorically, why appellant would change his appearance. He compared appellant's appearance with his appearance on a video taken during the confrontation with the sheriff's deputies. The video was played at that point in the argument and the prosecutor described it as showing 14 shots fired from appellant's nail gun at deputies and a clearly marked patrol car. The prosecutor argued that the video showed the real appellant.

These remarks constituted proper comment upon the evidence and upon appellant's credibility as a witness. Comments on a defendant's changed appearance at trial are not misconduct where the prosecutor is referring to the fact the defendant no longer resembles the person witnesses will describe. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1001.) Moreover, "'[r]eferring to the testimony and out-of-court statements of a defendant as "lies" is an acceptable practice so long as the prosecutor argues inferences based on *evidence* rather than the prosecutor's personal belief resulting from personal experience or from evidence outside the record.' [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 773, italics added.) Here, appellant testified that he did not aim at or intend to hurt any officers. As we have discussed, there was evidence to support the inference that this was a lie.

B Appeals to Passion or Prejudice

Appellant argues the prosecutor improperly appealed to the jury's passions and prejudices by arguing appellant's purpose in the incident was to commit suicide; that appellant was engaged in his own personal war that included the police; and that appellant shot at targets inside his house to be ready to start his war.

In closing, the prosecutor discussed photographic exhibits entered into evidence by stipulation. Photographs of the interior of appellant's home showed a nail gun, a cylinder of compressed air, alcohol, and a door with 20 nails embedded in it. The prosecutor asked rhetorically what this evidence meant. He contended that it meant that appellant was preparing to use all the nails and had practiced on the door to know "how deadly this weapon can be." The prosecutor continued: "He wants to be ready for other people he wants to be ready for when he starts his war. He's waiting for his opportunity, he's practicing." This evidence, the prosecutor argued, demonstrated preparation.

The prosecutor also argued: "Something in Mr. Silva's background led him to target these officers specifically as part of his plan. It could have been the fact that he had prior contacts with officers, that weren't pleasant. . . . One thing we do know, he doesn't like officers, . . . He could have chosen to take his life other ways but he wanted to use an officer to do that."

Appellant asserts that there was no evidentiary basis for the prosecutor to argue that he wanted to commit suicide. We disagree. Appellant testified that he was extremely depressed, very upset, and had been drinking. He denied taunting the deputies to shoot him, saying he did not want to get killed that day.

"'[A] prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.'" (*People v. Dykes*, *supra*, 46 Cal.4th at p. 768.) In light of appellant's behavior during this incident, we conclude that the prosecutor's argument that appellant may have been suicidal was fair comment and not misconduct. The same conclusion applies to the argument that appellant was practicing an attack. Similarly, the comment that appellant was going to go to "war" was fair comment given

the length of the standoff and volume of nails fired by appellant at multiple peace officers. Appellant argues there was no basis in law or fact for the prosecutor to assert that appellant wanted to kill law enforcement officers. The evidence is to the contrary. He fired more than 107 nails at multiple officers over a period of several hours. This was fair comment on the evidence presented.

Appellant also cites the prosecutor's argument that appellant wanted the officers to come into his house to do battle with them. This also was fair comment. The evidence established that appellant taunted the officers, made crude gestures at them, and cursed them. He repeatedly went back and forth from his house while mounting an attack on the officers.

Appellant argues his counsel should have objected to the prosecutor's argument that appellant "already got his lucky break in this case, that is based upon the fact that no one was killed or injured by what he did that day and that he is here today alive." He contends that this argument implicitly urged the jury to convict "lest Silva receive yet another 'lucky break.'" We find no misconduct. This was fair comment on the evidence. Given the circumstances, it was indeed fortunate that none of the officers, or appellant, was injured or killed.

C. Personal Knowledge

During cross-examination, appellant denied dislike of police officers. He argues it was improper for the prosecutor to argue there was "something" in appellant's background that made him target the officers, and that he did not like officers. The prosecutor suggested that appellant's dislike of officers was based on prior contacts. We find no suggestion of personal knowledge beyond the record and no misconduct.

Appellant admitted two prior felony convictions in his testimony. The jury could reasonably conclude that the "something" that led to appellant's dislike of peace officers was these prior convictions. "'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the

most damaging rather than the least damaging meaning from the prosecutor's statements.' [Citation.]" (*People v. Dykes*, *supra*, 46 Cal.4th at pp. 771-772.) As we have discussed, he fired more than 107 nails at multiple officers over several hours. This supported the suggestion that appellant disliked peace officers. This did not constitute misconduct.

D. Mischaracterization of Facts

Appellant argues the prosecutor "grossly" mischaracterized the facts by arguing: (1) appellant had a "'plan'" to have an officer shoot him and (2) he "wanted to 'take a few officers with him.'" We already have quoted a portion of the prosecutor's argument that something in appellant's background made him dislike peace officers and that he wanted to use a police officer to take his life. In the same paragraph, the prosecutor said: "Why would he miss, ladies and gentlemen? He is going to die anyway. Might as well take a few officers with him."

Appellant speculates that this argument was "motivated by a desire to enhance the evidence on counts four and eight [assault on Deputies Berg and Niebla], where the failure of the named officers to testify contributed to the weakness of evidence on those counts." He cites his testimony that he did not want to die that day.

As we have discussed, there was substantial evidence to support the convictions for assault on Deputies Berg and Niebla. We have concluded that it was fair comment, given appellant's behavior throughout the confrontation, to argue that he was suicidal. Given the extent of the assault on the officers, it was fair comment to argue that appellant wanted to kill several officers before being killed himself.

E. Vouching

Appellant argues the prosecutor improperly vouched for the credibility of the peace officer witnesses. He cites several passages in which the prosecutor addressed the fact that Deputies Berg and Niebla did not testify. First, the prosecutor said in closing: "Now, officers didn't testify. Clearly I think the case is stronger with the officers that did testify in this case. They could personally say they were afraid, that they were shot at. There is no reason to disbelieve them, notwithstanding the fact that—I mean, there is

really no reason to disbelieve them at all. Now the officers that didn't testify, Niebla, Berg, Garcia. Based on the testimony of others do support the fact that they were shot at, in the line of fire, in the zone, being hit with a deadly weapon. As we know, ladies and gentlemen, deputies out in the field have other jobs to do as well as all of us. We can't easily take every single person who was out at that location that day and basically tell Lakewood Station to shut down for that day and not protect any—not respond to any calls, not provide services for the public in order to have every single officer testify who was there come to trial. That's understandable."

The prosecutor then discussed his burden to prove appellant's guilt beyond a reasonable doubt. He emphasized that the standard is reasonable doubt, "Not beyond all doubt, not 100 percent, not beyond all doubt and not as the instruction says to put on every single witness. . . . This case it's beyond a reasonable doubt, but even beyond that. Let's say that is the case for the officers who did testify, the officers who we have is beyond a reasonable doubt and beyond that. Now for the deputies who didn't testify, it is beyond a reasonable doubt not as much—not as strong as the case for the deputies who did testify but still it is beyond a reasonable doubt. You can have an abiding conviction in voting the defendant guilty. You can walk away from the courtroom knowing that you did the right thing, based upon the evidence that you have heard today."

Appellant claims these comments vouched for the credibility of the prosecution witnesses. "Impermissible vouching occurs 'where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony.' [Citation.] But 'so long as a prosecutor's assurances . . . are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [his] comments cannot be characterized as improper vouching.' [Citations.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1167, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

As we read the prosecutor's argument, it was a somewhat inarticulate effort to discuss the strength of his case, comparing the evidence presented by the victims who

testified to the evidence relating to the victims who did not testify. He admitted that the evidence was stronger as to the peace officer victims who testified, but contended that the evidence as to the other victims met the standard of proof beyond a reasonable doubt. It was fair comment on the evidence to argue there was no reason to disbelieve the testimony of the officers. The explanation about officers who did not testify invoked the standard jury instruction that neither side is required to call as witnesses all persons who may have been present, which has been repeatedly upheld. (*People v. Ratliff* (1986) 41 Cal.3d 675, 693 [discussing CALJIC No. 2.11].) We find no impermissible vouching.

In summary, we find no prosecutorial misconduct. There was no reason for an objection, and the failure of appellant's counsel to object was not unreasonable. (*People v. Salcido, supra,* 44 Cal.4th at pp. 171-172.) Under these circumstances, appellant's counsel's failure to object did not result in a violation of his constitutional right to the effective assistance of counsel. (*Ibid*.)

DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.